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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 439

UNITED STATES OF AMERICA,

Appellant,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, HARRY D. FOLLETT AND EDWARD D. CHOUINARD.

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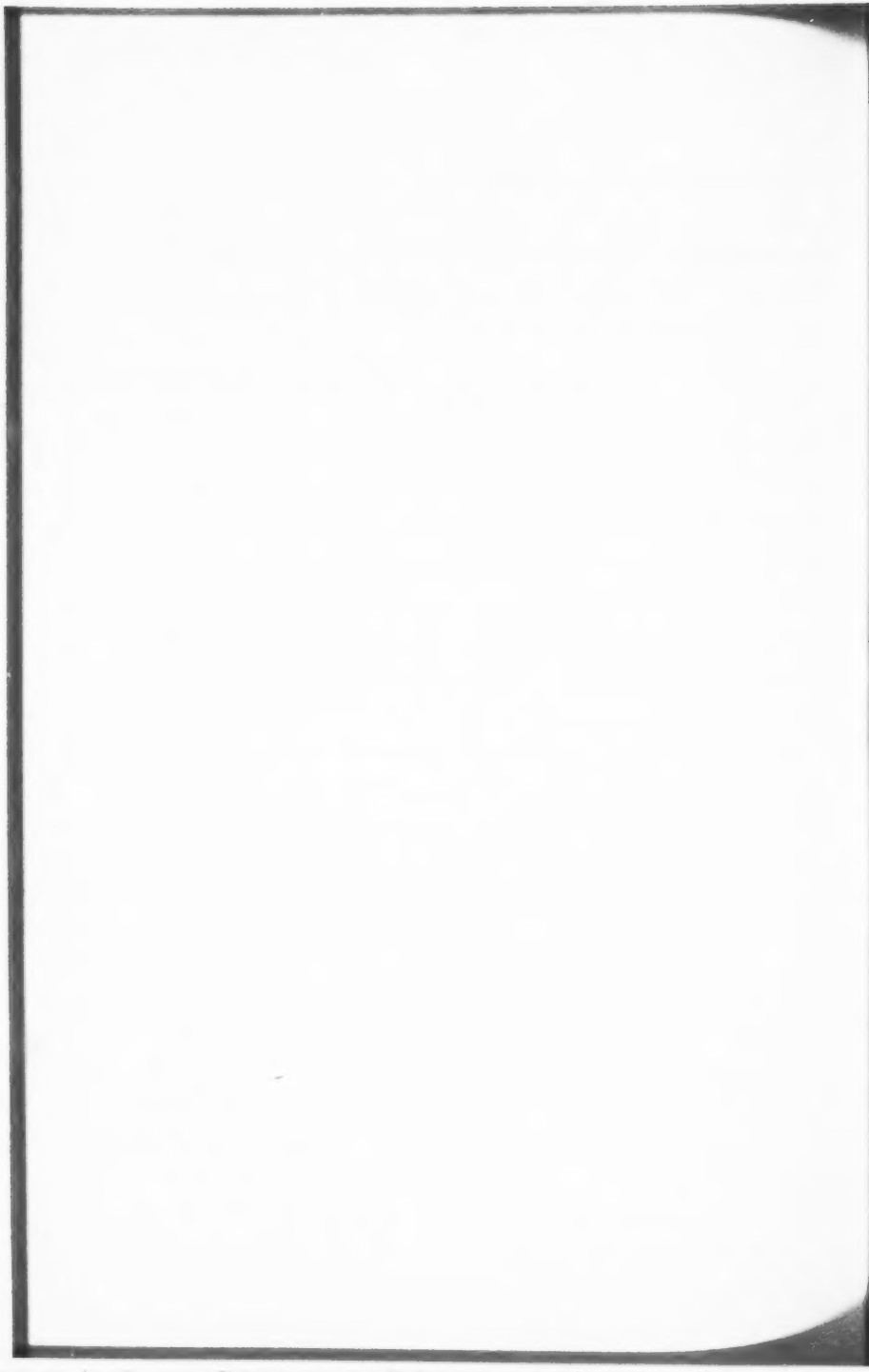

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OPINION BELOW.

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION.

This Court has jurisdiction under Section 2 of the Expediting Act[1] to determine whether the District Court had jurisdiction under Section 4 of the Sherman Act[2] to pre-

1. Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

2. Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, 15 U. S. C. 4.

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vent and restrain the local activities alleged in the complaint.

QUESTION PRESENTED.

We consider appellant's statement of the Question Presented (Br. 2) misleading and unfair, as we explain in part A of the Argument in this Brief, and believe the following to be a forthright statement of the critical issue on this appeal:

The complaint alleges an agreement between a local union and a local employers' organization to "suppress competition" in the employers' completely intrastate services. The parties to the agreement work with, but never own, materials originating in other States. The parties use the materials in constructing improvements on Illinois real estate. The complaint does not allege that anything the parties have done was intended to or did in fact restrain the alleged interstate flow of materials into the local area.

The question presented is whether the complaint states a claim against the union and the employers' organization for which relief can be granted under Section 1 of the Sherman Act, solely because some of the materials used by the parties originate in other states.

STATUTES INVOLVED.

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
>
> * * * * *

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Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT.

The Statement in the Government's brief, like the complaint, is circumlocutory, metaphorical and sprinkled with legal conclusions and paraphrases of the language of the Court in other cases.

The facts alleged in the complaint are not complex and can be stated directly and concisely in simple outline, for example:

1. The Chicago area is in the three Illinois counties of Cook, DuPage and Lake.[3]

2. Building Materials:

   a. Lathing materials are used in constructing buildings in the area.[4] They include "gypsum lath, metal lath, cornerites, corner beads, channel irons and tie-wire" produced in States other than Illinois.[5]

   b. Local building material dealers purchase lathing materials from out-of-State sources.[6] Usually the building material dealer orders lathing materials for his stock,[7] because he expects to sell them (he anticipates a regular demand for them),[8] but sometimes he orders them after a

3. Par. 7. R. 3.
4. Pars. 8, 9 (R. 3); 11-14 (R. 4); 15, 16 (R. 5).
5. Par. 11, R. 4.
6. Par. 12, R. 4.
7. Pars. 12, 13 (R. 4).
8. Par. 13, R. 4.

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plastering contractor has placed an order with him.[9] Most shipments of the materials are delivered to the dealer's place of business[10] but some are delivered at the job-site or at the plastering contractor's place of business.[11] The building material dealer resells the materials to a plastering contractor.[12] The plastering contractor contracts with a building owner or a general contractor, to lath and plaster the walls and ceilings in a particular building.[13] A few plastering contractors employ, supervise and pay journeymen and apprentice lathers, members of Local 74, to help build walls and ceilings with the various lathing materials,[14] but most plastering contractors make contracts with employing lathers to take charge of these operations for them.[15]

c. Other building materials and appurtenances used in constructing buildings in the area include plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes.[16]

d. A substantial part of such other items is produced in States other than Illinois, sold and shipped to the Chicago area, distributed, and added to lathed and plastered walls and ceilings.[17]

3. Defendants' functions.

a. Employing lathers are hired by contract, by the plastering contractors[18] who own the lathing materials while they remain distinct from the

9. Par. 12, R. 4.
10. Par. 12, R. 4.
11. Par. 14, R. 4.
12. Par. 12, R. 4.
13. Par. 8, R. 3.
14. Par. 23, R. 7.
15. Par. 8, R. 3.
16. Par. 16, R. 5.
17. Par. 16, R. 5.
18. Par. 8, R. 3.

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building,[19] to take charge of incorporating them into the structure. Employing lathers hire, supervise and pay journeymen and apprentice lathers in and for this work.[20]

b. Journeymen and apprentice lathers use lathing materials in building walls and ceilings.[21]

4. In 1951, new building construction and remodeling to the value of $500,000,000 was done by the building construction industry in the area.[22] $5,000,000 (1% of the total) was paid under lathing contracts to the members of the defendant Association.[23]

6. The conspiracy.

a. The co-conspirators were:[24]

(1) The Association,[25] which consisted of 16[26] of the 36[27] employing lathers in the area, who in 1951 received 5/8 of the money paid in the area pursuant to lathing contracts, for lathers' wages and employing lathers' charges.[28]

(2) Local 74 which consisted of approximately 700 journeymen lathers and apprentices who performed "practically all" of the lathing work in the area.[29]

(3) Harry D. Follett, an employing lather and president of the Association.[30]

(4) Edward D. Chouinard, an employing lather and active member of the Association.[31]

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19. Pars. 12-14, R. 4.
20. Par. 15, R. 5; Pars. 8, 9 (R. 3); Par. 6, R. 3.
21. Par. 6, R. 3.
22. Par. 16, R. 5.
23. Par. 10, R. 4.
24. Par. 3 (R. 1-2); Par. 19, R. 6.
25. Par. 3(a), R. 1-2.
26. Par. 3(a) (R. 2).
27. Par. 9 (R. 3).
28. Pars. 9, 10 (R. 3).
29. Par. 3(b) (R. 2).
30. Par. 3(c) (R. 2).
31. Par. 3(d) (R. 2).

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(5) "Numerous" employing lathers, "including those who are members of the Association,"[32] and "others to the plaintiff unknown."[33]

b. Duration: "For many years past," to the date of the filing of the complaint.[34]

c. Terms:

(1) Local 74's approval would be necessary[35] for any person to become an employing lather permitted to employ and supervise skilled labor in lathing work; one qualification for employing lathers would be five years' prior membership in Local 74;[36] members of Local 74 would not submit to employment and supervision by any employer not first approved by Local 74;[37] and membership in Local 74 would be restricted by racial and family relationship standards.[38]

(2) Particular plastering contractors would be assigned to certain employing lathers.[39]

(3) The number of plastering contractors who employ and supervise members of Local 74 without using employing lathers would be reduced.[40]

(4) The Association and others would "effectuate payments" of money to officers of Local 74 to "induce them" to "utilize the power of that Local" in "furtherance" of the conspiracy.[41]

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32. Par. 5 (R. 2).
33. Par. 19 (R. 6).
34. Par. 19 (R. 6).
35. Par. 20(a)(1) (R. 6).
36. Par. 20(a)(2) (R. 6).
37. Par. 20(a) (3) (R. 6).
38. Par. 20(a) (4) (R. 6).
39. Par. 20(b) (R. 6).
40. Par. 20(c) (R. 6).
41. Par. 20(d) (R. 7).

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7. The things agreed upon were done.[42]

8. There were approximately 95 employing lathers in the area in 1925 and 36 in 1952.[43] 16 of these agreed to register the "accounts" claimed by them, and not to solicit or perform lathing contracts with a plastering contractor "recognized" as the "account" of another employing lather without the other's consent.[44]

No further facts are alleged.

Crucially, no facts are alleged showing what the *conspiracy* had to do with the *building materials*.

SUMMARY OF ARGUMENT.

A. The business allegedly restrained is described in the complaint as the business of employing and supervising skilled labor in working with lathing materials. The allegations of the complaint afford no justification for the government's statement (Br. 4) that interstate commerce in building materials was to be restrained under the conspiracy. The complaint does not allege that defendants here obstructed the local distribution or use of goods arriving from other States. It therefore does not allege a restraint of interstate commerce. *United States* v. *Oregon State Medical Society*, 343 U. S. 326; *United States* v. *Yellow Cab Co.*, 332 U. S. 218; *Industrial Association* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. This case is unlike the cases cited by the Government in which parties had obstructed channels of distribution or prevented use of the goods or services in the State of destination. *Lorain Journal Co.* v. *United States*, 342 U. S. 143; *Local 167* v. *United States*, 291 U. S. 293; and especially *National Labor*

42. Pars. 21-28 (R. 7-9).
43. Par. 29(a) (R. 9).
44. Par. 28 (R. 9).

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Relations Board v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675.

The Sherman Act is not designed to punish strikes, lockouts, arbitrary union membership rules and similar interferences with local building construction. Par. 18 of the Complaint, R. 5, alleges that "*any* restraint upon or disruption in or *interference with the performance of lathing work* in the Chicago area necessarily directly restrains and affects the interstate flow of lathing materials". This is an argument instead of an allegation, and an argument which proves so much, it proves nothing. The same argument, if accepted, would prove that any local strike or that the Denver Building and Construction Trades Council in the situation which gave rise to the case of *N. L. R. B.* v. *Denver Bldg. Council*, 341 U. S. 675, violated the Sherman Act as well as the National Labor Relations Act.[45]

The above-quoted argument is the sole statement by which the complaint attempts to show an effect of the conspiracy on interstate commerce in materials. Effects on interstate commerce are essential allegations, and not merely particulars. Lacking such allegations, a complaint "fails to state a cause of action under the Sherman Act". *United States* v. *Yellow Cab Company*, 332 U. S. at p. 233.

B. Whether building materials are still "in interstate commerce" long after they arrive at materials yards in the State of destination and have been sold to plastering contractors, as the Government here contends (Br. 17-20), is not involved. Since the instant complaint did not allege a restraint upon trade in such materials at any stage, local or interstate, the question is not properly at issue here. Moreover, the materials here involved were acquired and held by local people for local disposition, and hence beyond the limits of interstate commerce defined in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Standard Oil*

45. 29 U. S. C. § 151, *et seq.*

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Co. v. *Federal Trade Commission*, 340 U. S. 231. This appeal is a deliberate attempt to extend the federal power over local matters without consulting Congress or the States.

C. The "restraint" allegedly contrived by these defendants was not unreasonable *per se*, nor would the facts alleged justify an inference that the conspiracy might have had unreasonable effects.

D. Argumentation and obfuscation in pleadings is contrary to the spirit of the federal rules of civil procedure and should not be resorted to by counsel representing the sovereign any more than by other counsel.

ARGUMENT.

A. The Complaint Failed to Allege a Restraint Upon Interstate or Intrastate Commerce in Lathing Materials or in Other Building Materials.

The trial judge dismissed the complaint because it failed to allege a restraint upon interstate commerce. His decision was correct, and should be affirmed.

The alleged facts show unquestionably that the employing lathers perform a local service, the hiring and supervision of skilled labor in one phase of construction work. The complaint alleges a plan to restrict that function to men with five years' experience at the work they wish to supervise, to let the union determine who may employ and supervise its members, and to assist the men performing that service in keeping their steady relationships with the plastering contractors for whom they work, free from attempts by 15 of the 35 others to disestablish and replace them. Further, membership in the union was to be open

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only to persons meeting its unspecified "arbitrary" membership restrictions.

Like many other practices in this and other industries, reasonable men may debate the social and economic wisdom of such an arrangement as this. But the anti-trust division has authority to bring its challenge before the courts, only if the intent or the effect of the arrangement is far-reaching enough to unduly burden some interstate trade and commerce over which the parties to the arrangement exert some effective influence or control.

The parties complained of in this case are in the local building industry, and some of the materials which they use in their work are products of manufacture in other States. This is the only connection between the "conspiracy" and interstate commerce. The author of the complaint took pains to allege, albeit not very directly or clearly, the course followed by such materials from their out-of-State sources to the buildings in which they are incorporated by the skilled labor of the union lathers under supervision of the employing lathers. Nowhere, however, does it appear that the agreement under attack reached out to control the trade and commerce by which the materials reached their final destination. The materials appellees work with are provided for them by the plastering contractors for whom they work. The typesetters who help to print this brief have a closer relationship to the ink and paper industries, than the appellees in this case have to the building materials industry. Moreover, while many other local services touch articles which later move forward again, into interstate commerce, walls (which these appellees make), never move again.

The lack of connection between the appellees and interstate commerce of any kind led the antitrust division to unusual efforts to allege a connection by metaphors and abstractions where none could honestly be stated as a fact.

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Thus the complaint solemnly alleged that "lathing contractors are conduits," and that lathing materials "flow" through these "conduits" in a "continuous stream". It generalized that *any* interference with the performance of lathing work necessarily burdens interstate commerce in lathing materials, in violation of the Sherman Act. It did not allege that the agreement in question interfered with the performance of lathing work. The complaint argued that the increase in the cost of building in the area, in this period of general price advances due to wars, material shortages, labor costs and supply and demand, was one of the "effects" of the conspiracy. It did not say that lathing work was made more expensive, nor that the arrangement resulted in less efficiency in the performance of lathing work.

The Government's brief consistently commits a demonstrable error in interpreting the complaint: it assigns to the employing lathers the function of buying and reselling lathing materials orginally shipped from other States, a function which the complaint correctly assigned to plastering contractors. This error in the Government's brief is vital and seriously misleading, since the sole commerce influenced by the conspiracy is alleged to have been the competition among employing lathers ("lathing contractors").

According to the complaint (par. 8, R. 3), *plastering contractors,* in their contracts with general contractors, agree "to furnish the plastering and lathing materials and to have the same installed." It is the plastering contractor who contracts "for the sale of said materials to general contractors or building owners." "* * * the plastering contractor enters into a subcontract with the lathing contractor for the installation of lathing materials in the building, said lathing materials being furnished by the plastering contractor to the lathing contractor." What the

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"lathing contractor" does (par. 15, R. 5) is "employ and supervise skilled labor for this purpose" (installing lathing materials).

Despite these explicit allegations to the contrary, the Government brief refers (p. 2) to employing lathers as "contracting to furnish and install lathing materials."

According to the complaint (pars. 8-14), *all* of the lathing materials alleged to come from other States are purchased from (or "through") local dealers by plastering contractors and resold by plastering contractors to general contractors or building owners. (The "sale" is in the form of lathed and plastered walls.) Yet the Government's brief asserts (p. 2) that the complaint "alleged that a major part of the materials which lathing contractors supply * * * is shipped into the Chicago area from outside the state." In defining "lathing contractors," the complaint says that they "customarily enter into contracts based upon the furnishing of labor and part of the lathing materials by the lathing contractor * * *" but (a) this general allegation must be disregarded because inconsistent with the numerous more particular allegations in pars. 8-14 that the plastering contractor furnishes all lathing materials, and (b) this allegation does not assert, as does the Government's brief, that any lathing materials *from other States* are furnished by "lathing contractors." Paragraphs 8-14 purport to describe what happens to lathing materials from other States, and they show that appellees do not furnish such materials, but merely use those furnished by others for their use.

Having thus assigned broader functions to employing lathers, the Government's *brief* next enlarges the scope of the conspiracy to take in these added functions. As a result of such bootstrap-lifting, the conspiracy which the *complaint* described as one to "suppress competition among the lathing contractors in the Chicago area and to restrict

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and exclude persons from engaging in the lathing contracting business in said area" is represented (Br. 4) to be one of "conspiring to restrain interstate commerce in lathing materials shipped from outside the State of Illinois."

The very term, "lathing contractor" is apt to mislead, as it has apparently misled Government counsel, when applied to employing lathers. These men do not call themselves "lathing contractors," they are known as employing lathers and they call their association the Employing Lathers Association. They are men capable of employing skilled workmen and supervising lathing work, but the complaint clearly shows that they are not also in the business of buying and selling goods, as is commonly true of contractors in the building industry. In this brief, therefore, we refer to the employing lathers as employing lathers, rather than as "lathing contractors."

Analysis of the complaint in this case quickly reveals what was done in attempting to forge the all-important link between the alleged conspiracy, and interstate commerce. A type of "all-for-the-want-of-a-horse-shoe-nail" logic is used. Succinctly put, if the lathers would not install it, a lath would not be needed, and if it were not needed, it would not be shipped to Chicago in interstate commerce.

However, the complaint does not allege that as a result of the conspiracy, the lathers refused to install lath, or installed less lath, or that less lath was needed, or less lath was shipped to Chicago in interstate commerce. It does not allege that any building was prevented from being completed, or any builder was restrained from building; or any person in the Chicago area or elsewhere was injured in any way. For aught that appears, the volume of lathing work done in the area may have greatly expanded, the quality and safety of ceilings and walls built in the area may have been greatly enhanced, and the de-

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mand for lathing work and the consumption of lathing materials may have greatly increased, as a result of appellees' conduct.

The complaint merely alleges:

> (Par. 15, R. 5). "* * * The service performed by lathing contractors * * * is an integral part of, and necessary to, the movement in interstate commerce in lathing materials * * *. * * * The function performed by said lathing contractors * * * is essential to the interstate flow of said materials, since said lathing materials are of no use to the ultimate purchaser until they are installed in buildings. * * *"
>
> (Par. 16, R. 5). "The lathing operation is an integral part of the building construction industry * * * and the performance of said lathing operation is necessary to the completion of other building operations, including * * * the installation of plumbing fixtures [etc.] * * *"
>
> (Par. 17, R. 5). "The installation or use in buildings of said building materials and appurtenances [plumbing fixtures, etc.] is an integral part of, and necessary to, the movement in interstate commerce of said materials * * *."
>
> (Par. 18, R. 5). "Any restraint upon or disruption in or interference with the performance of lathing work in the Chicago area necessarily and directly restrains and affects the interstate flow of lathing materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area."

Here the allegations concerning effects on interstate commerce stop. The rest of the complaint deals with an alleged agreement as to who shall supervise the 700 union members while they build walls and ceilings with lathing materials. There is no agreement as to how fast or how long they shall work, no agreement as to how much they

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shall be paid, no agreement as to what type of lathing material they shall install, and no interference with the performance of lathing work. There is no attempt to fix the price of lathing material, no attempt to control the quality or quantity of lathing material, and no attempt to determine who shall buy and who shall sell the material. The subject matter of the "conspiracy" is whether the lathers shall be supervised by former lathers approved by their union, and the agreement is that they shall. If this agreement has somehow burdened interstate commerce in building materal, the complaint has kept the secret well. The other subject dealt with by the "conspiracy" is whether 16 of the 36 employing lathers shall compete for each other's accounts, and the agreement is that they usually will not. That such an agreement does not necessarily interfere with the purchase and sale of materials from other States was established in *United States* v. *Oregon State Medical Society,* 343 U. S. 326, and the complaint does not allege anything to show such an effect in this case.

To be sure, commerce among the States may be, and frequently is, burdened by practices in the State of final sale of goods which move interstate. *Local 167* v. *United States,* 291 U. S. 293, 297; *National Labor Relations Board* v. *Denver Bldg. Council,* 341 U. S. 675. The trial judge in this case recognized this when he said (Tr. 31, R. 16-17):

> "There is no allegation of any effect of that intrastate conspiracy upon the interstate market price of the building material involved. I might add, so far as I can see there is no allegation of any discrimination or anything that would cause a man to buy his building material in Wisconsin or in Chicago or in California, no restraint that I can find in the allegation. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. * * *"

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Government counsel speak (Br. 14, 15) of the trial court's "apparent assumption that obstructions to and restraints upon interstate commerce can occur only at the beginning, or in the course of, an interstate movement of goods." The court made no such assumption. It *first* considered whether there was a restraint of the trade in materials before they were used by appellees in Illinois, in the passage quoted above, and finding none alleged, turned then to discuss, in the paragraph attacked at p. 15 of the Government's brief, the other possibility that there might be a restraint upon goods moving out into interstate commerce.

Unwittingly, the Government commends the logic of this approach by adopting the same organization in its brief. Thus at pp. 15-20, it discusses "state of destination" restraints such as were found in the *Local 167* and *Lorain Journal* cases, and later at pp. 21-22, it discusses "state of origin" cases such as *Mandeville* and *Sportswear*.

In *Local 167* v. *United States*, 291 U. S. 293, the defendants included poultry slaughterers and wholesalers and two service unions (teamsters and slaughterers). The metropolitan area was interstate, including parts of New York and New Jersey. Pursuant to the conspiracy, teamsters refused to haul poultry from the two terminals (in Manhattan and Jersey City) to recalcitrant marketmen, and slaughterers refused to slaughter for them. There was interference with "the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted." (291 U. S. 297.)

Neither the sales and prices of lathing materials in the Chicago area, nor the shipment and movement of such materials into the area was alleged to be affected in the instant case. If there had been interference of that kind, the complaint would have said so. The Government has had many years' experience in alleging restraints on interstate commerce.

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There was nothing alleged in the complaint to show that defendants sought to prevent anyone in their home State from using building materials from other States, as was true in *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675, cited at pp. 12 and 15-16 of the Government's brief. In that case the strike sought to require a Denver general contractor to cease doing business with a Denver electrical contractor which purchased in other states 65% of the materials it sold in Colorado, and which also shipped $5,000 of its products to other states. In the instant case there is no stoppage or interference with the purchases or sales of the building material dealers who buy materials in other states or of the plastering contractors who buy materials from them in the Chicago area and use them locally.

Moreover, the National Labor Relations Act was designed to reach not all obstructions of interstate commerce but practices of certain specific types described by Congress, if found by the N. L. R. B. in particular cases to be practices "tending to lead to" burdens upon or obstructions of interstate commerce. It may thus be compared to the Clayton Act[46] with its prohibitions of certain practices when the Federal Trade Commission finds in a particular case that they tend to lessen competition in interstate commerce. These statutes contrast sharply with the Sherman Act, which in very general terms prohibits all threatened or actual restraints of interstate commerce. To interpret and apply the Sherman Act as the Government here suggests would overrule *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and similar cases, and hold every local strike to be a conspiracy to restrain interstate commerce, and hence a Sherman Act violation and would render both the National Labor Relations Act and the Clayton Act obsolete. Government counsel here have suggested (Br. 23) that the Sherman Act should be applied wherever there is "a

46. 15 U. S. C. § 12, 14 *et seq.*

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pattern of restraint 'which if left unchecked may well become far-reaching in its harm to commerce.'" It was because the Sherman Act did not prohibit restraints in their incipiency that the Clayton Act and the Robinson-Patman Act[47] were enacted.

The four N. L. R. B. cases cited in the Government's brief[48] are all cases under the National Labor Relations Act in which the Board and the Court held that the practices complained of were of the specific types which Congress had prohibited in the Act, and occurred in circumstances which brought them within the Board's jurisdiction. They were not cases where the executive branch decided that the defendants' local acts, if often repeated in other localities, might constitute a pattern in restraint of interstate trade. Similarly, *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, cited at p. 20 of the Government's brief, involved an administrative hearing and determination that the price discrimination there involved *tended* to lessen competition in interstate commerce in the manner prohibited by the Statute. None of these were claims under the Sherman Act for anything so broad as "restraint of trade". To follow them in Sherman Act cases would destroy the rule of reason and so broaden the Act as to destroy its constitutionality. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 63.

In the Sherman Act cases cited by the Government there were direct and substantial burdens upon interstate trade. In *United States* v. *Women's Sportswear Mfr's. Assn.*, 336 U. S. 460 (1949), the Court stated (p. 461), "We first should be satisfied that the activities on which restraints

47. 15 U. S. C. §§ 13, 13a, 13b, 13c.

48. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675 (Br. 12, 15-16); *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694 (Br. 16); *Carpenters Union* v. *National Labor Relations Board*, 341 U. S. 707 (Br. 16) and *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643 (Br. 23).

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are alleged to have been exerted constitute commerce among states," and noted (p. 462), "at least 80% of the finished sportswear is sold and shipped to customers outside of that state." The Court stated the rule at p. 464 as follows:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

The "squeeze" in the *Sportswear* case was applied to garments which were to be shipped from Massachusetts to many other States.

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), is another case which turned on the issue whether the acts complained of had substantial effects upon interstate commerce. The Court there also stated (p. 234) the requirement of "a *showing of actual or threatened effect upon interstate commerce.*"

The complaint in the *Mandeville* case, unlike the present complaint and indictment, was replete with specific allegations showing the effect of the acts complained of upon interstate commerce.[49] In holding that the *Mandeville* com-

49. The Court summarized the allegations with respect to the effect of the price-fixing agreement upon interstate commerce, including allegations (pp. 225-226): "* * * that *each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price* on the agreed uniform basis of average net returns" and "* * * that prior to 1939 the northern California refiners had 'competed in interstate commerce with each other as to the *performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales returns and decrease expenses,*' * * *"

Further allegations were:

"However, for the seasons 1939, 1940 and 1941, *under the new uniform contracts and prices, 'there was no longer any such competition* * * *.*' Instead it was alleged upon information and belief that, *as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or 'as it would have had said conspiracy not existed.'* In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free,

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plaint stated a cause of action under the Sherman Act, the Court referred to the "specific allegations which we have set forth" (334 U. S. at page 237); and observed (p. 246):

> "The allegations are comprehensive and, for the greater part, specific concerning both the restraints and their effects."

No such statement could be made of the allegations of the instant complaint.

The interstate commerce affected in *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951), was "a continuous flow of copy, payments and materials moving across state lines" (342 U. S. at p. 148) which was diverted from radio station WEOL to the Lorain Journal; broadcasts of "advertisements of goods and services on behalf of suppliers outside of Ohio" which resulted in interstate orders and shipments; and WEOL's broadcasts "heard with some regularity by many people in southeastern Michigan." (See note 5, p. 148.) By eliminating station WEOL, defendant would not only have burdened all of that commerce; it would have destroyed it altogether. The effect on the interstate commerce in the *Lorain Journal* case was direct, substantial and devastating.

There has been no change in the elementary principle that a restraint or monopoly substantially affecting only a

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and *petitioners 'did not receive the reasonable value of their sugar beets.'*

"* * * *instead of the refiners 'producing and selling raw sugar in interstate commerce * * * in competition with each other * * * they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system * * *'*; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, 'insofar as the growers were concerned,' *as if they were one corporation owning and controlling all factories in the area*, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring." (Emphasis supplied)

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local business does not violate the Sherman Act. This legal proposition, which plaintiff has sought to gloss over as "now deemed not illuminating" (Br. 31) is recognized and applied in all of the recent cases relied upon by plaintiff, and *Industrial Association* v. *United States*, 268 U. S. 64, was cited and relied upon by this Court in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, in 1952, long after the decision of *Wickard* v. *Filburne*, 317 U. S. 111.

Plaintiff's citation of cases where local restraints fixed prices, reduced sales, or threatened completely to destroy all movement, of goods and services in interstate commerce, serves only to emphasize the truth that in this case, plaintiff pleaded no facts showing any such burden on the alleged continuous, uninterrupted flow of building materials into Illinois buildings.

Appellant suggests (Br. 22) that the requisite effect on interstate commerce need not be alleged in this enlightened day, but may be developed at the trial, or defendants might seek a more definite statement. However, the Federal Rules of Civil Procedure require that a complaint allege facts "showing that the pleader is entitled to relief" (Rule 8 (a) (2)), and this Court has held that a complaint fails to state a cause of action if it merely alleges a restraint upon a local service without facts as to effects on interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233. The *Mandeville* case, as we have shown, stands for the same proposition by stressing the "comprehensive and specific" allegations of interstate effects which saved the complaint. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557 (C. A. 9), cited in note 8 at p. 18 of the government's brief, held an allegation of "continuous

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flow" to be a statement of ultimate fact only when *"taken with other allegations"*.[50] But no case is cited by the Government, and none is known to us, where the mere fact that the defendants used items from other States in their work was held as a matter of law to establish that an agreement as to their local services necessarily burdened trade in the items used.

Far from being a mere matter of detail, allegations showing the effect of an alleged conspiracy to have regulated and restrained interstate commerce unduly were held to be jurisdictional in *Levering and Garrigues* v. *Morrin*, 289 U. S. 103 (1933). Appellant's failure to allege that essential jurisdictional fact was a defect which went to the heart of the district court's jurisdiction under Section 4 of the Sherman Act.

To uphold the instant complaint would be to abolish the most basic element in the Sherman Act—unless interstate commerce is unreasonably restrained, there is no violation of the Act.

B. It Is Immaterial How Long the Lathing Materials Remain "In Interstate Commerce", Since the Allegations Show That Appellees Had No Control Over Trade in Lathing Materials in the Chicago Area.

Appellant labors at length (Br. 17-20), to persuade the Court that lathing materials are still flowing in a continuous stream of interstate commerce while they are piled up

50. The specific allegations included the facts that defendants "purchase the parts outright and resell them as their own property", (180 F. 2d at p. 558) and had agreed "to raise and fix wholesale prices on parts * * *, to decrease and fix wholesale discounts on parts * * * and to compel authorized dealers to adhere to the prices and discounts so fixed", with the effect of eliminating all price competition in the sale of all Chrysler parts and engines which reached the area of the restraint.

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in lumber yards, transferred from train to truck, or waiting at the job-site and being used by union lathers in constructing walls and ceilings. Appellant does not, however, show that defendants have *done or agreed to do anything* to slow down the movement of the goods involved. There is not even any charge as to what portion of the lathing materials in the area are installed by appellees, or what portion are in any other way related to the charges of restraint and monopoly.

To be sure, the complaint and indictment allege figures as to the dollar volume of lathing contracts, but those figures relate to wages and contracting charges, and not to costs of materials. The appellees are not alleged to be in the business of buying and selling materials. They are not a part of the trade in materials. Appellees merely work with someone else's materials. They have no effect on the supply, the price or the quality of such materials.

We know of no other case in which the government has ever complained of anyone having so little to do with interstate commerce in goods or services as the employing lathers have to do with the materials involved in this case.

Since appellees' service is purely local and has no effect upon trade in the materials, the Court needs not decide whether laths are still in interstate commerce when the union lathers begin to use them in the construction of walls. Appellant's theory of continuous flow is certainly novel, when applied to goods as far removed from the out-of-state suppliers who ship them into Illinois, and appellant cites no case involving comparable facts. But what is even more important is that appellees have no ownership, or control over the price, supply or quality, of the materials. Appellees are not charged with attempting to gain such ownership or control, and certainly are not alleged to have conspired to restrain trade in the local business of buying

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and selling lathing materials as they allegedly "flow" from lumber yards to plastering contractors to lathing contractors to job-sites and right into the structure of homes and other buildings.

As authority for the requested holding that lathing materials remain in interstate commerce after being purchased by and delivered to plastering contractors, the Government relies (Br. 18-20) on *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231. In the *Jacksonville Paper* case goods ordered in advance by specific customers, purchased by respondent from out-of-State mills, unloaded for checking at the warehouse and then sent out as quickly as possible were held still to be in interstate commerce despite this temporary pause. The Court further held that items which had been printed at the out-of-State mill with the name of the customer, and certain goods obtained by respondent to meet the particular needs of specified customers, were also in interstate commerce whether or not procured in response to prior orders, because (p. 569), "The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate." However, as to goods ordered by the wholesaler for its stock, in anticipation of the needs of regular customers, the Court held that unless there was a "practical continuity in transit" until delivered to the wholesaler's customer, the goods in question were not still in interstate commerce, because they were no "different from goods acquired and held by a local merchant for local disposition."

Under the allegations in this case, therefore, lathing materials ordered for stock by dealers were "acquired and held by a local merchant for local disposition", and all other shipments ceased to be in interstate commerce

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when delivered to the plastering contractor, where the parties "intended that the interstate movement should terminate."

In *Federal Trade Commission* v. *Standard Oil Co.*, 340 U. S. 231, gasoline was in interstate commerce when sold in Detroit by the same company which had refined it in Indiana, transported it in tankers across Lake Michigan, and stored it in tanks awaiting sale. By contrast, the lathing materials described here were sold to the building material dealer by the party which shipped them into Illinois. Thus, the *Standard Oil* case lends even less support than the *Jacksonville* case to the theory that lathing materials owned by plastering contractors remain in interstate commerce while being incorporated by appellees into parcels of real estate in Illinois.

It is significant that both of the cases relied upon by the Government involved statutes which apply to individual shipments and sales still in interstate commerce when they reach local markets, while the Sherman Act prohibits restraint of interstate markets only. The Fair Labor Standards Act and the Robinson-Patman Act prohibit specific types of conduct within a State so long as the goods remain in the practical continuity of interstate transit, because Congress has found that such intrastate conduct tends to burden interstate commerce. In cases under these statutes, whether the goods involved are *in* interstate commerce when the violation of the statute occurs is crucial, while in Sherman Act cases the only relevant concern is whether an interstate market feels the pinch, whether or not the squeeze is applied while the goods are in intrastate commerce.

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C. No Unreasonable Restraint Was Alleged.

The agreement described in the complaint permits Local 74 to approve or disapprove persons wishing to employ, undertake to pay, and supervise, members of Local 74. Under it the union limits its approval to persons having five years' experience as union members doing the kind of work they wish to supervise. It also restricts each of 16 particular employing lathers from soliciting the plastering contractors with whom the other 15 already have working relationships. At least since *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, it has been recognized that "the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices" (310 U. S. at p. 500). While restraints which "control the market to the detriment of purchasers or consumers of goods and services" (310 U. S. at p. 493), do not necessarily take the form of price-fixing or restrictions on production, they are limited to restraints which are substantial enough to affect market prices.

There is no allegation from which it can be inferred that the agreement alleged in the instant complaint was substantial enough to affect market prices.

The market involved cannot be the local market for the services of employing lathers and the labor of union lathers. A local service is not interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233, *Hopkins* v. *United States*, 171 U. S. 578, 603. Government counsel have already abandoned hope of persuading this Court to uphold the contention that the defendants' labor and services are a part of interstate commerce within Section 2 of the Act, and now "deem the validity of the latter charge a matter which need not be pressed and which this Court need not reach." (Br. 4, footnote 2.) The contention that

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defendants' restraint of the local market for their labor and supervisory service violates Section 1 of the Act assumes that such services and skills are interstate commerce, and is as absurd as the monopolization charge.

However, this contention is not yet abandoned, so we are obliged to consider whether the market for appellees' services and labor in the Chicago area has been unreasonably restrained. One must search the complaint in vain for an indication that the charges made in employing lathers' contracts with plastering contractors, or plastering contractors' charges to builders for lathing and plastering, were affected in the slightest degree as a result of the "conspiracy". There is nothing in the nature of price-fixing, reduction in volume of contracts entered into or performed, or change in the caliber of the supervision of journeymen and apprentice lathers by either employing lathers or plastering contractors. In fact, paragraphs 13-15 and 17 of the complaint allege and reallege that lathing materials flow in substantial quantities without interruption from other States until incorporated into Illinois real estate by the skilled labor of the lathers under the supervision of the employing lathers.

With only 16 of the 36 employing lathers alleged to participate in the "assignment" plan, it appears that even a plastering contractor "assigned" to one of these 16 may receive bids from 21 employing lathers approved by Local 74, including the one "claiming" the plastering contractor as his account. The alleged assignment of some of the plastering contractors to particular employing lathers does not involve *any* restriction as to the territories in which the respective suppliers of service will operate, as did the plan in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, yet the Court there held (p. 337),

"This is not a situation where suppliers of com-

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> mercial commodities divide territories and make reciprocal agreements to exploit only the allotted market, thereby depriving allocated communities of competition."

A fortiori, neither is this.

Paragraph 29 of the complaint which purports to describe "effects" of the conspiracy consists only of the pleader's unsupported conclusions as to remote effects which are far more likely to have resulted from general economic conditions than from the agreement charged to the defendants, and no facts are alleged which show any connection whatever between those "effects" and defendants' acts.

Like the situation in *Ruddy Brook Clothes Inc.* v. *British and Foreign Marine Ins. Co.,* 195 F. 2d 86, 90 (7 Cir. 1952), cert. denied, 344 U. S. 816, the acts and agreements here alleged are "as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors." As Mr. Justice Cardozo once wrote (concurring opinion in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 554):

> "Activities local in their immediacy do not become interstate and national because of distant repercussions. * * * To find immediacy or directness here is to find it almost everywhere."

D. No "Monopolization" of Any Part of Interstate Commerce Was Alleged.

It is evident that defendants, who never own them, could not monopolize trade in lathing materials, so the only thing they could monopolize would be their own labor and supervisory service. The Government's brief, therefore, abandons the charge in the complaint that defendants have monopolized a part of interstate commerce in violation of Section 2 of the Sherman Act.

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E. The Complaint Violated Important Requirements of the Federal Rules of Civil Procedure.

The Government's complaint in this case departed so far from the standards for pleadings announced in the Federal Rules of Civil Procedure as to call for special mention in this brief.

Rule 8, F.R.C.P. provides:

> "(a) *Claims for Relief.* A pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and *plain statement* of the claim showing that the pleader is entitled to relief, * * *.
>
> "(e) *Pleading to Be Concise and Direct; Consistency.*
>
> (1) Each averment of a pleading shall be simple, concise, and direct. * * *."

The 73 lines of allegations in paragraphs 11-15 of the complaint must be read and re-read, to learn from them the simple facts that (1) out-of-state suppliers sell lathing materials to Chicago area dealers, delivering some to the dealers' places of business, some to the plastering contractors' places of business, and some to construction job-sites; (2) Chicago area dealers order some lathing materials for their stocks and some in response to prior orders from plastering contractors; and (3) the plastering contractors own the lathing materials after they buy them, until the lathers build them into walls and ceilings.

We submit that such a plain, simple, concise and direct statement of facts was called for by Rule 8, F. R. C. P. We are convinced that the facts were shrouded in conclusions and interpretations for the purpose of persuading the district judge that appellees were engaged in buying and selling lathing materials, or at least leaving that question open until the trial, and that the ulterior purpose was to apply the Sherman Act to a local situation where it does not

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reach, not in open defiance of the established precedents, but under cover of the obscurity and indirectness of the sentences used in the complaint.

By affirming the district court's judgment dismissing this complaint, the Court may remind the anti-trust division that "plain", "simple", "concise" and "direct" are words which have the same meaning and significance for Government attorneys as for all other members of the bar.

Conclusion.

For the reasons stated herein, the complaint did not show that appellant was entitled to relief against appellees, and the judgment below dismissing the complaint should be affirmed.

Respectfully submitted,

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